81-2279

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STEPHEN L. BEST, LETTY SHEILD BEST,
EDWARD E. FIRTH, and ANNA WESTWOOD FIRTH,
Petitioners,

v.

UNITED VIRGINIA BANK/NATIONAL and
UNITED VIRGINIA MORTGAGE CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court of Virginia was correct in holding that, in Virginia, a lender may reserve by contract the right to accelerate the debt due to it upon sale or conveyance of the property securing that debt.

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RESPONDENTS' BRIEF IN OPPOSITION

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

The Respondents, United Virginia Bank/National and United Virginia Mortgage Corporation, respectfully pray that this Court deny the Petition for Certiorari seeking review of the judgment of the Supreme Court of Virginia in the above entitled case, decided January 22, 1982, with rehearing denied on March 12, 1982.

JURISDICTION

It is well-settled that to receive review of a state court decision a petitioner must demonstrate that he has presented a substantial federal question in a timely manner to the state court.[1]

> The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it.[2]

The only exception to this rule is where the constitutional question arises out of the state court's unanticipated decision which threatens constitutionally protected rights.[3]

The Petitioners failed to raise any federal question before the Supreme Court of Virginia prior to its judgment. They now seek to confer jurisdiction upon this Court solely on the basis that the decision below "was a total surprise, and could not have been anticipated on the basis of prior rulings and the principle advanced by the Lender."[4] The Petitioners state that the holding of the Supreme Court of Virginia that the obligatory language in a contract controls where such language conflicts with prefatory language in the same contract had not been raised in the proceedings below.[5] However, the Petitioners addressed this issue at length in their brief before the Supreme Court of Virginia, arguing that the prefatory language constituted a limitation upon the provisions of the deed of trust.[6] The Respondents answered this contention in their reply brief, arguing that the

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[1] *See* Rule 21.1(h), Rules of the Supreme Court of the United States.

[2] Herndon v. Georgia, 295 U.S. 441, 443 (1935).

[3] *Id.* at 443-44.

[4] Petition at 7.

[5] Petition at 6-7.

[6] Brief of Appellees at 3-6.

Petitioner's "interpretation contravenes well established principles for the construction of written instruments, accepted rules of syntax, and common sense." [7] Much of the oral argument before the Supreme Court of Virginia focused on the construction of the language in the deed of trust. Thus, the issues upon which the Petitioners claim surprise were presented, briefed and argued below. Any constitutional claim which the Petitioners desire to present should have been raised at that time.

Secondly, the exception created in *Herndon v. Georgia* [8] contemplates that the finding of the state court must represent a substantial departure from precedent and prior construction to constitute an "unanticipated ruling." [9] In *Herndon*, this Court dismissed the appeal for want of jurisdiction on the grounds that Herndon could not plead ignorance of prior decisions in Georgia and "was therefore, bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the Court below." [10] In the instant case, the Supreme Court of Virginia construed the deed of trust in accordance with its previous decision in *Scott v. Albemarle Horse Show*,[11] which stated:

> If, however, there is an inconsistency between the obligatory part of the contract and the recitals therein, effect will be given to the obligatory part rather than to the recitals, as this is regarded as the more vital and important of the two. . .[12]

Thus, the ruling in the instant case as to which the Petitioners claim surprise is in accord with prior decisions

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[7] Reply Brief of Appellants at 7. *See generally* Reply Brief of Appellants at 5-7.

[8] 295 U.S. 441 (1935).

[9] 295 U.S. at 444-46.

[10] 295 U.S. at 446.

[11] 128 Va. 517, 104 S.E. 842 (1920).

[12] 128 Va. at 526, 104 S.E. at 845.

of the state court below and does not represent a new construction of the legal principles involved nor does it constitute a departure from precedent. Therefore, the Petitioners were bound to anticipate the ruling in this case and have failed to preserve any right to review here.

The question presented for review by this Court is essentially a question of state contract and property law. Notwithstanding the characterization of the question presented by the Petitioners, at no time have the Respondents asserted any right to forbid the transfer of title to the real property securing the debt to the lender. In fact, the property was transferred from the Firths to the Bests on May 31, 1978, and the Bests have had the unrestricted dominion, control and possession of the property since that date. The Respondents have simply asserted their contractual right to accelerate the indebtedness when a transfer was made in disregard of that contract. That assertion raises no federal question.

This Court has consistently upheld the right of a state court to construe the contract and property laws of its state without review by this Court unless the construction creates an intrusion upon constitutional rights so severe that federal review is necessary.[13] No such intrusion has been demonstrated in this case. The construction of Virginia contract and property law in this case clearly is an adequate and independent state ground of decision precluding the assertion of jurisdiction by this Court.[14]

It is, therefore, respectfully requested that this Court deny certiorari in the instant case for want of jurisdiction, on the grounds that no substantial federal question has been presented, no federal question was presented in a timely fashion in the court below, and there exists an adequate and independent state ground for the decision below.

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[13] Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1937).

[14] Murdock v. Mayor of Memphis, 87 U.S. (20 Wall.) 590 (1875).

ARGUMENT

It is well settled that contractual provisions permitting a lender to accelerate its debt upon transfer of the property securing that debt do not constitute unreasonable or unconstitutional restraints upon the alienation of property.[15] In *Williams v. First Federal Savings & Loan Association*,[16] the Court of Appeals for the Fourth Circuit held

> Nevertheless, the lenders have legal rights, too. If they have complied with all requirements of the law, they are entitled to enforce their due-on-sale clauses, for they are simply not restraints on alienation.[17]

The imposition of a due-on-sale clause is not a restraint on the borrower's right to alienate his property, rather it represents a contest between competing interests that is best left to the marketplace to determine, and this Court should avoid taking sides in a battle of economic forces.[18]

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[15] *See, e.g.*, Williams v. First Federal Savings & Loan Association, 651 F.2d 910 (4th Cir. 1981); Malouff v. Midland Federal Savings & Loan Association, 181 Colo. 294, 509 P.2d 1240 (1973); Occidental Savings & Loan Association v. Venco Partnership, 206 Neb. 469, 293 N.W.2d 843 (1980); Crockett v. First Federal Savings & Loan Association, 289 N.C. 620, 224 S.E.2d 580 (1976); Gunther v. White, 489 S.W.2d 529 (Tenn. 1973); Redd v. Western Savings & Loan Co., 50 U.S.L.W. 2727 (Utah May 21, 1982); Lipps v. First American Service Corp., 223 Va. —, 286 S.E.2d 215 (1982).

[16] 651 F.2d 910 (4th Cir. 1981). The Petitioners' reliance upon the *dicta* concerning the instant case contained in the *Williams* decision is misplaced. Petition at 14. This argument was presented to the court below, was fully argued before that court, and was rejected by that court.

[17] 651 F.2d at 926.

[18] *Accord*, Redd v. Western Savings & Loan Co., 50 U.S.L.W. 2727 (Utah May 21, 1982).

In *Fidelity Federal Savings & Loan Association v. de la Cuesta*,[19] this Court upheld the Federal Home Loan Bank Board's due-on-sale regulations. This Court expressly declined to interfere with the economic forces in question, holding

> As Judges, it is neither our function, nor within our expertise, to evaluate the economic soundness of the Board's approach. In promulgating the due-on-sale regulation, the Board reasonably exercised the authority, given it by Congress, so as to ensure the financial stability of "local mutual thrift institutions in which people . . . invest their funds and . . . [which] provide for the financing of homes."[20]

It is submitted that this Court should exercise similar restraint in this case.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[19] No. 81-750 (U.S. June 28, 1982).

[20] *Id.* at 27.